In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1090

WILLIE LEE TERRELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was found guilty on all four counts of an information charging him with two counts of failing to file employer's annual tax returns for agricultural employees for the years 1970 and 1971, in violation of 26 U.S.C. 7203, and two counts of failing to account for and pay over taxes collected by him as a crew leader during the same years, in violation of 26 U.S.C. 7202 (App. 1-4).[1] Petitioner was sentenced to concurrent terms of one month on two of the counts, and concurrent terms of 18 months on the remaining two counts. Pursuant to 18 U.S.C. 3651, the court ordered petitioner to be imprisoned for a total of four months. Petitioner was also fined $2,000 (Pet. 18-21). The court of appeals affirmed (Pet. 15-16).

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[1] "App." refers to the appendix filed in the court of appeals.

Petitioner raises two contentions: (1) that the jury was not properly instructed with respect to the element of willfulness; and (2) that the statute classifying petitioner as an employer of certain farm workers is unconstitutional.

1. With respect to the element of willfulness, the trial court charged the jury as follows (App. 106-107):

> I charge you that the word "wilfully" as used in this Information means a voluntary and intentional violation of a known legal duty. Therefore, an act is done wilfully if it is done knowingly and voluntarily and intentionally, and with the specific intent to do something which the law forbids, that is to say with a bad or evil purpose either to disobey or to disregard the law.
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> Conversely, an omission or failure to perform an act required by the law is wilful if the defendant knew that the act was required by the law and if the defendant voluntarily and intentionally, and without justifiable cause, failed to perform the legally required act, that is to say, the non-performance of a required act was voluntary and deliberate and resulted from a bad or evil purpose on the part of the defendant to disregard or to disobey the law.

This instruction adheres to this Court's definition of willfulness in criminal tax cases. *United States* v. *Bishop*, 412 U.S. 346. Contrary to petitioner's requested instruction,[2] the government was not required to prove an affirmative act of evasion because this was not an evasion

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[2]The requested instruction read as follows (App. 122):

> In order to sustain a conviction under §7202, you must find that the defendant willfully failed to account for and willfully failed

case. The information alleged only acts of omission. Thus, the instruction requested by petitioner could only have misled the jury. Cf. *Spies* v. *United States*, 317 U.S. 492.

Petitioner relies (Pet. 10-11) upon *Wilson* v. *United States*, 250 F.2d 312 (C.A. 9). That case, however, involved a prosecution for evasion of payment of certain taxes. It was tried to the court without a jury. Unlike this case, the conviction in *Wilson* was reversed because the trial court failed to give consideration to testimony regarding the defendant's inability to pay. Here, however, the jury was required under the trial court's instructions to consider petitioner's defenses (App. 62) that he had no money to pay the 1970 and 1971 tax and that he believed he was required to file returns only if he had the money to pay the tax. Cf. *United States* v. *Rosenfield*, 469 F.2d 598, 601 (C.A. 3), certiorari denied, 411 U.S. 932.

2. Petitioner further argues (Pet. 12-13) that 26 U.S.C. 3121(*o*), which defines the circumstances under which a crew leader is an employer of farm laborers for purposes of the Federal Insurance Contributions Act (Social Security), is unconstitutional. That statute treats a crew leader as an employer if (1) he actually furnishes individuals to perform agricultural labor for another person; (2) he actually pays the individuals so furnished; and (3) he has not entered into a written agreement with the other person

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to pay over the taxes. The fact that he failed to pay the tax or that he intentionally preferred other creditors over the United States is not, standing alone, proof of willfulness.

There must be evidence of an affirmative act on the part of the defendant to evade the payment of taxes. Proof that the taxpayer failed to pay over taxes because he was motivated by reason of a desire to preserve business or because of a financial inability to pay does not establish the required affirmative conduct. It must be shown that his failure was due to an intent to evade tax. [Footnotes omitted.]

whereby the individuals are designated employees of the other person. This is a reasonable classification, which reflects several of the common law indices of an employer and such a legislative classification will not be set aside if it can be rationally justified under any state of facts. See, *e.g.*, *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6, and cases cited therein; *Shanahan* v. *United States*, 447 F.2d 1082 (C.A. 10).

The reasonableness of the statutory test regarding the circumstances under which a crew leader is an employer is amply demonstrated by the Senate committee which reported out the bill (Social Security Amendments of 1956, Sec. 105(b), 70 Stat. 828). In its report (S. Rep. No. 2133, 84th Cong., 2d Sess. (1956)), the Senate committee stated (p. 12):

> Your committee believes that deeming the crew leader to be the employer of the individuals he recruits and pays would simplify the reporting of workers for social-security purposes, and would also be to the advantage of many of the farm workers who customarily work as members of a crew. Since they generally work for the same crew leader longer than for a single farm operator, they will have a better chance of having their farm work covered by old-age and survivors insurance. Also, a larger proportion of their farm wages will be covered if the crew leader is the employer.

Heiner v. *Donnan*, 285 U.S. 312 (see also *Vlandis* v. *Kline*, 412 U.S. 441), relied upon by petitioner (Pet. 13), does not support his claim that Section 3121(*o*) is unconstitutional. As this Court pointed out in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85, and as the Tenth Circuit noted in *Shanahan* v. *United States, supra*, the presumption involved in *Heiner* was invalidated because, in the Court's view, it created an unreasonable classifi-

cation. *Vlandis* was decided on the same basis. 412 U.S. at 446. Compare *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 363, 376-378. Section 3121(*o*), in contrast, provides a reasonable set of criteria, which, if met, establish that a crew leader is an employer for purposes of the Social Security Act.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.